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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO PETITION FOR REHEARING AND AMICI CURIAE BRIEFS.

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G. W. Burley, et al., respondents, herewith present this reply to the Petition for Rehearing and respectfully show to the Court that there is no basis for granting or considering a Rehearing in the above entitled cause for the following reasons:

I.

The Majority Opinion Does Not Misrepresent Petitioner's Position With Reference to the Rights of Individual Employees Under the Act and Petitioner's Allegation Is a Misrepresentation of Its Position in Reference Thereto.

Nowhere in petitioner's brief, nor in any of the various and sundry briefs filed by *amici curiae,* is there pointed out any misconception of the law or facts by the Court in

its opinion. Nowhere is there shown any conflict with any previous decision of this Court or any other Court by the decision rendered in this case. We, therefore, state that neither the petitioner nor *amici curiae* have made any showing to justify this Court in granting a rehearing or reversing their decision herein.

The opinion of this Court did not inadvertently misrepresent petitioner's position with reference to the rights of employees under the Act. Petitioner took a very definite stand as to these issues.

From an examination of the Petition for Rehearing, it is apparent that either petitioner has not read its own briefs, or is deliberately misrepresenting the facts to this Court, as have certain others, as will be shown later in this brief.

Petitioner takes issue with the Court's statements, on page 16 of the opinion, that:

> "Petitioner urges that, notwithstanding the proviso • • • the effect of the provisions taken as a whole is to make the collective agent the employees' exclusive representative for the settlement of *all* disputes, both major and minor, and of the latter 'whether arising out of the application of such (collective) agreements or otherwise.'"

In support of the Court's observation in the opinion, may we point out on page 5 of petitioner's Petition for Writ of Certiorari, it makes the following statement:

> "Such direct bargaining is demanded by the decision of the Circuit Court of Appeals in this case. The result will be destruction of the policy created by the Railway Labor Act and conflict with the decisions of this Court prohibiting individual dealing with employees as announced in the case of • • •"

Again at page 8 it enunciates:

> "• • • the policy declared by the Railway Labor Act which imposes 'the affirmative duty to treat only

with the true representative and, hence, the negative duty to treat with no other.' "

which, we respectfully submit, was one of the main grounds upon which petitioner sought review.

Again at page 20 of petitioner's brief it states:

"Apart from the administrative difficulties, the mandatory provisions of the Act, as regards the petitioner 'imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other.' "

Also on page 25 of petitioner's brief, it states:

"By the terms of the labor agreement, this power to treat with the Petitioner is given *only* to the General Grievance Committee of the Brotherhood on the Elgin, Joliet and Eastern Railway System, of which C. H. Williams was General Chairman and S. F. Johnson was Secretary." (Italics ours.)

In the next paragraph on the same page the petitioner states:

"The compulsory provisions of that Act requiring the defendant 'to settle all disputes,' if possible, with the designated representatives of the Brotherhood culminated in the settlement agreement of October 31, 1938. This was in compliance with the provisions of the labor agreement and of the Act. * * * The claims of the respondents asserted more than two years after the execution of the compromise agreement cannot override the provisions of the labor agreement between the petitioner and the Brotherhood that grievances 'shall be taken up' by the General Committee and *not by the respondents individually.* Nor can they override the duties imposed by the Railway Labor Act upon the petitioner and the respondents' designated representatives 'to settle all disputes.' " (Italics Ours.)

The second paragraph of the Opinion of this Court that petitioner takes issue with is:

" 'Petitioner does not squarely deny that the ag-

> grieved employee may confer with the carrier's local officials either personally or through *local* union representatives in accordance with the proviso to Section 2 Fourth. But this right, if it exists, is regarded apparently as at most one to be heard, since in petitioner's view the power to make settlement by agreement is vested exclusively in the collective agent. Cf. §§ 2 Sixth and 3 First (i).' "

On page 7 of petitioner's Reply Brief for Petitioner, the petitioner states, in reference to the power of the Union Representative:

> "The Act gave the designated representative the power to 'refer' this claim before the Board, if he so elected. The fact that such a claim may affect the 'personal' or 'individual' rights of the respondents is immaterial. Congress intended that disputes involving these rights may be referred by the designated representative to the Board for adjudication. If specific authority of the designated representative is necessary from each employee relating to matters affecting the 'personal' or 'individual' rights of each employee, designated representatives will be stymied in carrying out their statutory duties."

Here, clearly, the Court's statement is brought out that petitioner makes in its discussion between personal or individual rights of respondents or general grievances, and on page 25 of petitioner's Brief, which we have heretofore quoted, it says that only the General Grievance Committee has the power to take up or settle grievances with the General Superintendent or the Vice President of the Railroad.

Again on page 6 of the Reply Brief for Petitioner it states:

> "Designated representatives of the employees have power to change the labor agreement. The Act so provides. Designated representatives also have power to compromise grievances. That power to make the

compromise agreement of October 31, 1938, effective is derived from the provisions of the Act authorizing representatives 'to settle all disputes' and 'with all expedition.'"

Further on on the same page petitioner states, referring to C. H. Williams, as Chairman of the General Grievance Committee:

> "* * * was the designated representative of the respondents. *He alone* is the official of the Brotherhood authorized to file claims before the Adjustment Board." (Italics Ours.)

Again at the bottom of page 7, we have heretofore quoted this provision, hence now only refer to it.

On page 2 of the Petition, petitioner states that the employee representative has power to settle personal injury claims of employees, yet, at the bottom of page 7 of its Reply Brief, as heretofore quoted, it makes a statement diametrically opposed to that position.

On page 4 of the Petition for Rehearing, in the last paragraph, it admits that any employee individually may "confer" with it during working hours, etc., and states:

> "This has always been the practice of your petitioner, notwithstanding its recognition of the Brotherhood as the designated representative of the employees. Furthermore, an *individual* employee of your petitioner, whether or not he is a member of the Brotherhood, 'either personally or through *local* union representatives' may 'confer' with local representatives of your petitioner * * *"

Evidently petitioner now has been converted, for in its Brief for Petitioner, at page 20, the second paragraph thereof, its previous position was:

> "the mandatory provisions of the Act, as regards the petitioner 'imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other.' (*Virginian Railway Co.* v. *Federation,* 300 U. S. 515, 548.)"

Again at page 24 it had previously said:

"and that all 'disputes between a carrier or carrie and its or their employees shall be considered, and, possible, decided, with all expedition, in conference the representatives designated and authorized so confer. * * *' "

and at the top of page 25 they professed:

"Thus treating with the designated representativ is required by the collective bargaining agreement well as by the Railway Labor Act."

and in the third paragraph of that page they furth stated:

"The compulsory provisions of that Act requiri the defendant 'to settle all disputes,' if possible, wi the designated representatives of the Brotherhood cu minated in the settlement. * * *"

Further on they stated:

"The claims of the respondents asserted more th two years after the execution of the compromise agre ment cannot override the provisions of the lab agreement between the petitioner and the Brotherho that grievances 'shall be taken up' by the Gener Committee and *not by the respondents individuall* Nor can they override the duties imposed by the Ra way Labor Act upon the petitioner and the respon ents' designated representatives 'to settle all di putes!' " (Italics Ours.)

On page 5 of the Petition for Rehearing, at the botto of the page, they now state:

"Obviously, the Brotherhood is not the '*exclusi* representative' of an individual employee *seeking enforce his grievance after* settlement with the ca rier has failed. The individual employee need not r fer his grievance to the Adjustment Board for a judication."

Petitioner hereby, we believe, makes a contradicto statement. The whole tenor of its previous statements w

to the effect that once the Brotherhood officials have taken an employee's case they have the exclusive right to handle it as far as they desire without control or initiative or question by the employee. Yet, in the above quoted paragraph, petitioner admits that the individual need not submit his grievance to the Adjustment Board for adjudication, which, we submit, is the gist of our case, it being respondents' position that, (1) they had no knowledge, (2) no authority was given for filing of individual claims, (3) how could they be in a position to retract authority they had never given?

At the top of page 6 petitioner quotes its Brief and says:

> "'They could have directed their designated representatives to file a complaint in court and, thereby, obtain judicial determination of their claims.'"

We respectfully submit that we believe this is a classical example of the whole tenor of petitioner's and intervening *amici curias'* attempt to overthrow all of the hundreds of years of precedent in the law, and procedure. They would have us disregard everything that we have sought to build up for the safeguard of human rights to seek their ends. Since when do the designated representatives, of whom they speak of as being Officials, have a right to practice law in Courts and file complaints in Court and, "thereby, obtain judicial determination of their (individual) claims"?

Petitioner has the effrontery to seek affirmation of its position by further stating, on page 6 of its Petition for Rehearing:

> "As pointed out in petitioner's reply brief, p. 13, 'court adjudication is always available to designated representatives *or employees* before they *elect* to file a claim before the Adjustment Board' (emphasis added), in accordance with the decision of this Court

> in *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630. In that case this Court held that after endeavoring to settle a grievance with representatives of the carrier, an individual employee is not required to refer his claim to the union for enforcement or to the Adjustment Board for adjudication. He may elect to file in court a claim for his grievance and disregard the adjudicatory processes of the Board and the representatives of the union."

We fail to find anywhere in the case cited where the Court gives the "representative" the authority to file suit in any Court, for or on behalf of its members.

We believe we have sufficiently pointed out the nugacity of the Petition for Rehearing concerning these points. The whole tone throughout the Petition for Rehearing, Brief and Reply Brief is to completely black-out the individual rights of the respondents herein.

Petitioner, at page 6, again refers to undisputed facts in the case at bar, and states that its arguments were not intended to apply to cases of individual employees who had revoked the authority given to their representatives and who were individually seeking remedies for their grievances. We reiterate, how could respondents revoke authority that had never been given? The only authority of the representative is set out in the rules and regulations of the Constitution of the Brotherhood of Railroad Trainmen, Articles 6 and 7 thereof.

On page 7, it would seek to have this Court believe that, by being members of the Brotherhood, they "specifically" and "individually" authorized an affirmative course of conduct on behalf of the Brotherhood officials for their benefit. We again take issue with petitioner on the facts. Rule 6 of the Constitution of the Brotherhood provides for the presentation of the grievance to the Local Lodge. Rule 7 provides:

> "When the local chairman or grievance committee

> fails satisfactorily to adjust any grievance referred to it, as provided in the foregoing rules, and if the lodge so orders it, the secretary of the lodge shall immediately send a certified copy of the grievance to the chairman of the general grievance committee, and a duplicate copy of the grievance to the President of the Brotherhood. It shall be the duty of the chairman of the general grievance committee, on receipt of a certified copy of grievance, to appoint a time for the consideration of the grievance, and to summon the secretary of the general grievance committee, and the chairman of the local grievance committee of the lodge where the grievance exists, to meet with him at an appointed time. * * * A committee thus constituted shall have power to alter, amend, add to or strike out or with the approval of the President refer to the Legislative Department of the Brotherhood any part or all of any complaint or claim submitted to the committee, subject to appeal. * * *"

All of these matters refer to the internal organization and procedure of the Brotherhood of Railroad Trainmen and have nothing to do with this proceeding other than to show the utter lack of authority in the Brotherhood to file individual claims on behalf of the respondents, unless the procedure set out in the Brotherhood's Constitution was followed. This, the petitioner could readily verify.

Petitioner, we respectfully submit, confuses the term "collective bargaining" to include claims under, or breaches of, the agreement. "Bargain" means a contract or agreement between two or more parties; a compact settling that something shall be done.

Petitioner, on page 8 of the Petition for Rehearing, cites the *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342 wherein, despite a collective bargaining agreement as to wages *et cetera*, the employer made separate agreements with the employees as to the wages, *et cetera*. It disregarded the collective agree-

ment and made individual agreements with the employees, to the employees' detriment.

These are not the facts in the instant case. Here the bargain has been completed (the Working Schedule heretofore introduced in evidence) and respondents are seeking individually to recover for a breach thereof. Just as 'Jones' would seek to recover under a breach of a lease, or other private agreement, wherein the rights enured to the individual's benefit. There is nothing in this case that can detract from the collective agreement as made, nor is there any necessity or reason for the bargaining representative to be called in to represent, or supervise, or confer in reference thereto.

The quotation from the Telegraphers case implies that it deals with contracts that are effective *in futuro,* rather than a breach of one that is consummated, as we have in the instant case.

Petitioner, however, seeks to transpose its clear meaning thereof to include actions for a breach thereof, which, we respectfully submit, is contrary to the definite decisions of the Courts, the Railway Labor Act, and the fundamental principles of law.

Again petitioner has made the brash statement that it did not contend that the power to make settlement by agreement is vested exclusively in the collective representative. We respectfully submit that we have heretofore shown conclusively that such statement is absolutely contrary to its previously oft-repeated position.

On page 10 of the Petition for Rehearing, the bald statement is made that:

> "Your petitioner is not of the opinion that 'the collective agent also has *exclusive* power to submit the dispute to the Board and to represent aggrieved employees before it.' (Emphasis added.) *These*

matters, also, never were an issue in the case at bar. Consequently your petitioner took no position with reference to them."

We respectfully direct the Court's attention to page 6 of the Reply Brief for Petitioner, at the bottom thereof. The same petitioner who makes the statement in italics above states:

> "Respondents argue (brief, p. 23) that the Board has no jurisdiction of their 'individual' claims because there was no 'authority' in C. H. Williams, Chairman of the Grievance Committee, to present the same to the Board. There is no dispute that C. H. Williams, as Chairman of the General Grievance Committee, was the designated representative of the respondents. *He alone is the official of the Brotherhood authorized to file claims before the Adjustment Board."* (Italics ours.)

As to the argument set forth on page 11 of the Petition for Rehearing, obviously the Court is more astute than the petitioner. Ever since the inception of the "Board" the only people who have been allowed to file cases before it have been the Labor Organizations. Obviously the "Board" as well as petitioner and *amici curiae* are seeking to disregard the latest amendments to the Act, and are still proceeding under the old Act. Under the facts, therefore, petitioner's argument as to the individual's right to file before the Board, necessarily fall. At the bottom of page 12 petitioner's argument is facetious. Naturally no notice can be given to a claimant who is not a claimant, and if he was not a claimant then any award denying him redress would be void, which is the position of respondents in the instant case.

Petitioner has, on page 14 of its Petition for Rehearing, and subsequently therein, sought to introduce a new

and novel theory into the case, to wit, that once a n
joins a union forever after he is the pawn and tool
the officials and he has no rights except those they de
to grant him. He, as an individual, cannot maintain
rights nor seek redress for any wrongs, without first
taining the gracious consent of his master—the Un
Representative. Is this, then, the country of vaunted fr
dom? Are these, then, the precepts with which we
to nurture the minds of our future citizens—obeisance
the new masters, the Union Officials?

The Courts have held otherwise, as we pointed out
our Brief For Respondents, at pages 12 to 16 inclusi
and as has been held by the Court in *Hughes Tool Co
National Labor Relations Board*, 147 F. 2d 69, wher
that express question was passed upon by the Court, wh
states:

> "This case, presenting no question of fact, a
> whether the adjustment of individual grievance is
> exclusive function of the bargaining representat
> • • • ."

The Court answers the question thus:

> " 'Representatives designated or selected for
> purposes of collective bargaining by the majority
> the employees in a unit appropriate for such p
> poses, shall be the exclusive representatives of all
> employees in such unit for the purposes of collec
> bargaining in respect to rates of pay, wages, ho
> of employment, or other conditions of employme
> *Provided that, any individual employee or group*
> *employees shall have the right at any time to pres*
> *grievances to their employer.'* (Italics ours.)
>
> "• • • it is plain that collective bargaining
> respect to rates of pay, wages, hours of employm
> and other conditions of employment which will
> for the future the rules of the employment for eve
> one in the unit, is distinguished from 'grievanc

which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected."

In Note I thereof, the Court points out:

"* * * Grievances were not confused with bargaining, but were contrasted. This Court very plainly indicated its view that the collective bargain was one thing, and the personal grievance arising under it another thing, in *Moore* v. *Illinois Central R. R.*, 112 Fed. (2d) 959 (2 Labor Cases Par. 18,704). The cases cited by the Board from the Supreme Court, *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332 (8 Labor Cases Par. 51,173); *Railroad Telegraphers* v. *Railway Express Co.*, 321 U. S. 342 (8 Labor Cases Par. 51,174); and *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678 (8 Labor Cases Par. 51,176); *all deal with making contracts, not with adjusting grievances.* They hold there can be no contracts made except through the bargaining representative. *They said nothing on the subject of personal grievances.* In *Steele* v. *Louisville and Nashville R. R. Co.*, — U. S. — (9 Labor Cases Par. 51,188) the Supreme Court twice likened the collective bargaining to legislation. Grievances similarly resemble cases to be decided according to the law. (Italics ours).

As this Court stated in its opinion:

"Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement."

and further on the Court epitomizes the case with the following observation:

"In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier. We cannot say that the terms of the proviso to § 2 Fourth and of §3 First (j) are so limited. Moreover, § 3 First (p) expressly states that the statutory suit to enforce an

award in favor of an aggrieved employee may be brought by 'the petitioner,' presumably the collective agent, or by the employee. All of these provisions contemplate effective participation in the statutory procedures by the aggrieved employee.

"His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's. But the drastic effects in curtailment of his preexisting rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile. That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final and exclusive power of settlement in the collective agent."

At page 18 of the Petition for Rehearing petitioner again denies the Court's statement as to its former position in reference to the supreme authority of the collective agent. We respectfully refer to page 5 of the Petition for Certiorari of Petitioners, wherein it says that direct bargaining would be the destruction of the policy created by the Railway Labor Act and conflict with the decisions of this Court which prohibit individual dealing with employees. Also on page 8 thereof, in referring to direct dealing with employees, it says:

"* * * thus violating the policy declared by the Railway Labor Act which imposes 'the affirmative

duty to treat only with the true representative and, hence, the negative duty to treat with no other.' "

Also on page 20 thereof, (referring to individual claims) it says:

"The result also will be contrary to the decisions of this Court that the railroads must treat with the designated representative of the employees and imposing the duty 'to treat with no other.' "

So, too, in their Brief For Petitioner, at page 20 thereof, it says:

"* * * the mandatory provisions of the Act, as regards the petitioner imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other.' * * * In addition, the Act imposes the duty upon the petitioner and the designated representatives to consider and, if possible, to decide all disputes 'with all expedition.' "

At page 24 thereof it states:

"* * * the parties merely carried out the duties imposed upon them by the Act 'to settle all disputes' 'concerning rates of pay, rules, and working conditions,' *and that all 'disputes between a carrier or carriers and its or their employees* shall be considered, and, if possible, decided with all expedition, in conference *by the representatives* designated and authorized so to confer * * * .' " (Italics ours.)

And at page 25:

"Thus, treating with the designated representatives is required by the collective bargaining agreement as well as by the Railway Labor Act."

Again on the same page:

"The compulsory provisions of that Act requiring the defendant 'to settle all disputes,' if possible, with the *designated representatives* of the Brotherhood

culminated in the settlement agreement of October 31, 1938." (Italics ours.)

Further on it says:

"* * * that grievances 'shall be taken up' by the General Committee and *not by the respondents individually.*" (Italics ours.)

We have, in our former briefs and herein, considered the authority of the Brotherhood and the law thereof and, hence, will not burden the Court with a repetition herein.

II

The Majority Opinion Did Not Overlook Any of the Rules of the Brotherhood Pertaining to This Case.

Petitioners premise that the decision of this Court destroys collective bargaining is without merit factually or legally. Petitioners consistently misconstrue the term "collective bargaining" to include enforcement of individual rights obtained thereunder.

This, we submit, is evidenced by their insistent misinterpretation of the *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342 and *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, both of which cases pertain to the obtaining of employment contracts on behalf of members. As this Court stated in the *J. I. Case Co.* case:

"The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment."

and further on the Court held:

"But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms."

Beginning on page 21 of the Petition For Rehearing, to the conclusion thereof, we submit that petitioner's specious arguments relating to "specific" authority and general authority of representatives, hardly needs answering again. We respectfully submit that in our Brief For Respondents, at page 23 thereof, Point III, we have answered all of its assertions, innuendos and false conclusions.

In concluding, to give answer to the lie pertaining to what the representatives and their actions before the "Board" may accomplish by requiring authorizations, we respectfully refer to the Appendix attached hereto for other purposes, being a letter addressed to the Office of the Solicitor General by the Carrier Members of the Railroad Adjustment Board under date of October 26, 1945, wherein they state, at the bottom of page 2 thereof:

> "By September 4th, or slightly more than 30 days after authorizations were first furnished, they were being received in such number that the Division was not only able to function at full capacity, but it could not keep up with the cases in which such authorizations were received.
>
> "During the two weeks period from September 4th to 18th the Division rendered 73 awards and was prepared to render awards in some additional dockets on that date. There is attached hereto copy of a communication dated September 27, 1945, to the Chairman of the National Mediation Board reciting the facts as they occurred on September 18th and 19th."

Conclusion to Petition for Rehearing.

We, therefore, respectfully submit that petitioner has failed to show any inadvertence in the majority's opinion, and in its Petition has, at best, introduced nothing that has not heretofore been argued before the Court and that, therefore, this Court should disregard the same.

REPLY TO AMICUS CURIAE MEMORANDUM OF CONGRESS OF INDUSTRIAL ORGANIZATIONS.

I.

We respectfully submit that *amici curiae's* whole argument is summarized by their statement on page 2 of their memorandum:

> "It is our position that the disposition of grievances is an inseparable part of the collective bargaining process."

The whole brief is a scholarly treatise on the union officials' concept of collective bargaining, and reflects vividly their desires as to what they would like the Courts to interpret the law to be, notwithstanding the many conclusive opinions that have been rendered in reference thereto. Each and every opinion that they cite and that counsel for petitioner has cited and those cited by these respondents, uphold and are in harmony with the opinion rendered in the instant case. To hold otherwise would be to disrupt the orderly processes of law and government that have been built up so laboriously in this country. For, were the Court to follow their concepts, we would no longer have a government of the people but, rather, a government of union officials.

Innumerable times throughout their brief *amici curiae* attempt to misconstrue collective bargaining as distinguished from grievances or claims arising thereunder. Their whole brief is based upon this misconception and they seek to warp the meaning of the cases they cite to uphold their contention. Whereas a superficial reading thereof immediately impresses one with the inaccuracies of their contentions.

As the Court stated in *Hughes Tool Co.* v. *NLRB,* Fed. 2d 69:

> "• • • any individual employee or group of e ployees shall have the right at any time to pres grievances to their employer."

We have heretofore cited at length from the *Hughes* c but wish at this time to call the Court's attention to same in response to the allegations made by these *am curiae.*

In answer to their Point II, at page 6, we are prone ask this question. How can the superior economic pow of the employer influence the instant case? It is being tr before an impartial unbiased body, not subject to influenc economic or otherwise, that obviously was brought to b at the case at bar when it was purportedly brought bef the Adjustment Board, wherein these vaunted champi of the working men so miserably failed.

We were unable to find the case ited, *Holden* v. *Har* at 196 U. S. 366, so are unable to answer it.

The case of *Order of Railroad Telegraphers* v. *Railw Express Agency,* 321 U. S. 342, cited by *amici curiae,* d not uphold the contention propounded by them, but, on contrary, is in conformity with the views expressed by t Court and by respondents. So, too, with *NLRB* v. *Jo & Laughlin Steel Corp.,* 301 U. S. 1, 33. Both cases de with obtaining contracts for employees, not with rights action thereunder.

As to Point III, *amici curiae* make the statement t there is no provision in the Railway Labor Act for ployees to present grievances to the employer! Such statement is difficult to understand had the opinion in case been carefully read, for on page 1341, 89 L. Ed., t Court quoted from said Act thusly:

> "The Act's provisions do not require such a

struction. On the contrary they appear expressly to preclude it. The proviso to § 2 Fourth in terms reserves the right of 'an employee *individually*' to confer with management; and § 3 First (j) not only requires the Board to give 'due notice of all hearings *to the employee* • • • involved in any dispute submitted • • •,' but provides for 'parties' to be heard 'either *in person*, by counsel, or by other representatives, as they may respectively elect.' "

Under such a false premise, we submit, their whole argument must be fallacious, as is evidenced in the second paragraph on page 8 of their brief, wherein they maintained the Court held that such union settlements are not permitted, and that there must be settlement with the employees involved. What the Court held in the instant case was (89 L. Ed., p. 1343):

> "• • • an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance. • • • It must appear that in some legally sufficient way he authorized it to act in his behalf."

On page 9 of their brief, in the note, they cite the case of *J. I. Case Co.* v. *NLRB*, 321 U. S. 332. This case does not detract in any manner from the individual employees settling their cases, but it does enunciate the duty of the union representative to bargain for the employees' rights in obtaining their employee contract. It nowhere propounds the principle that the employee representative has the right to bargain away the employees' individual rights. The lengthy discussion pertaining to retrospective and prospective rights we do not believe is in point in the instant case because we are dealing entirely with a right of action that accrued by reason of a contract of employment that was broken by the employer. We respectfully submit that the only issues in the present case to be proved by the employee

are, (1) contract, (2) their employment thereunder, (3) the breach thereof by the employer, the petitioner in this case, and (4) the amount of damages the employee is entitled to thereunder, based upon the number of days they were refused work at the scheduled starting time. Certainly this connotes no prospective rights affecting the other members of the union. We, therefore, respectfully submit that it is not incumbent upon this Court to pass upon matters *dehors* the issues in the instant case.

We reiterate, there are no cases of record, of which we are aware after due and dilegent search, holding that the union representative has the authority to waive the individual rights of its members. All of the cases that we have cited in our brief hold that the contrary is the law.

Under Section B, page 15, *amici curiae* refer to Section 26 of the Act, wherein the admonition is given to confer. They fail, however, to cite all of said section, which is the gist of the reason for conference, namely:

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means *to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof.*"

If, in other words, the dispute shall be so involved that it may interrupt the operation of the carrier, Congress has admonished the representatives to confer and if they fail it shall be referred to the Board under which the provisions of that chapter it is authorized to hear and decide the dispute. Obviously not meant to cover a situation such as the instant case. Under the terminology expressed in the Act, we submit, that it is obvious that two different kinds of negotiations are contemplated by the Act.

Section IV of their brief sets out certain cases and

states that they are at variance with the decision in the instant case.

We have heretofore discussed the *O. R. T.* case and the *J. I. Case Co.* case, which, we submit, are in complete harmony with the decision in the instant case and in no way uphold the arguments propounded by *amici curiae* under this point. As stated at the beginning of our reply, the attitude throughout their brief is constant to misconstrue collective bargaining to include claims or grievances arising under a contract obtained through collective bargaining.

The *Medo Photo Supply Corp.* v. *NLRB*, 231 U. S. 678, case deals exclusively with collective bargaining in obtaining a working contract with the employer. That while still represented by the union, the employees made individual contracts of employment, and this Court there stated that such action was a violation of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, with respect to wages, hours and working conditions. At page 679 of the Opinion, the Court therein makes a remark which we believe apropos the instant case, wherein it states:

> "Unless a designated union acquires, by its selection, a thraldom over the men who designate it analogous to the power acquired by one who has a 'power coupled with an interest,' unbreakable and irrevocable by him who gave it, it would seem that any powers the union may acquire by virtue of the designation would end whenever those who confer them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves. And this should be true, whether or not previous notice is given to the union and whether or not the subject matter of the resumption may include, as one consequence of the dealing, the possible continuance of the agency."

The Court further stated:

> "I do not think Congress intended, by this legislation, to create rights in unions overriding those of the employees they represent."

We cite this to further exemplify the Court's reasoning in the instant case, that had the members so clothed their union officials with authority whereby they could act exclusively for them in all of their matters then, possibly, there would be some legal sense to the position taken by *amici curiae* in their present argument. But such is not the fact, and the Constitution of the Brotherhood of Railroad Trainmen does not purport to give the representatives of the employees thraldom over the employees they represent.

On page 18, *amici curiae* cite *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, and take issue with the holding in that case and the instant case. May we point out that the Court, in the *Hearst* case, gave a broad definition to the word "employee" so as to bring all persons possible under the benefits of that Act. The Court also recognized that at page 122:

> "In short, the assumed simplicity and uniformity resulting from application of 'common law standards,' does not exist."

This is not true respecting the laws of agency. As Justice Rutledge said in the Opinion at page 124, the word employee

> "derives its meaning from the context of the statute, which must be read in the light of the mischief to be corrected and the end to be attained."

The broad definition was given to the term employee for his benefit. In the instant case counsel would have this Court give a broad interpretation to the laws of agency, to the employee's detriment.

In heading number V it would appear that the National

Labor Relations Board is following a procedure expressly declared illegal by the Federal Court, for *amici curiae* cite the *Hughes Tool Co.* case in support of their proposition that, only if the exclusive representative declines to appear, the employer may dispose of the grievance in meetings with the individual employees alone. In truth and in fact the *Hughes Tool Co.* case was decided by the Circuit Court of Appeals in 147 Fed. 2d 69, which we have heretofore discussed (at page 12) and in which the Court stated:

> "• • • it is plain that collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment which will fix for the future the rules of the employment for everyone in the unit, is distinguished from 'grievances,' which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected."

The Court in that Opinion stated that grievances were not to be confused with bargaining, but were contrasted, and then cited many cases decided by this Court and enunciated clearly that all of them dealt with making contracts, not with adjusting grievances.

In heading number VI *amici curiae* take issue with the apparent intention of the Court to protect minority against majority and suggest that thereby it impairs the collective bargaining process. In note 2 of the *Hughes Tool Co.* case the Court stated:

> "That Congress intended to preserve the right of employees to confer with the employer is further evidenced by the proviso in Section 8 (2): 'Subject to rules and regulations made by the Board pursuant to Section 6 an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.'"

We suggest that the Court is following the well considered legislation of Congress.

It has been suggested that the actions of the union representatives in their collective bargaining for wages, hours and other things pertaining to working conditions, is like legislation. To follow the analogy through, would *amici curiae* suggest that our three divisions of government be abandoned and that the legislature should convene and pass upon every claim or grievance arising out of each and every law that they write in our statute books? Is that not in effect what *amici curiae* and petitioners herein are requesting this Court to sanction when they ask that each agreement that is arrived at through collective bargaining by employee representatives shall be interpreted and given effect to by those same employee representatives when each claim or grievance arising thereunder shall be raised by an individual employee? We think not, and respectfully suggest that if the negotiated contract obtained through collective bargaining be interpreted by the Adjustment Board set up for that purpose or by the Courts who are still one of the arms of government for the settlement of disputes or rights of the individual. Or would *amici curiae* suggest that we have one law for the employees of railroads, another for men who work in offices, another for those who work on our farms, and another for those who work in factories? In effect, is that not what they are asking? We have our constitutional government and the divisions thereof; we have our laws and they apply to contracts; we have our laws and they apply to agents, whether they affect union representatives or otherwise. They have their authority in their union by-laws for specific authorizations, the same as any other agents. We suggest that they follow them.

Respectfully submitted,

JOHN H. GATELY,
Counsel for Respondents.

REPLY TO THE MEMORANDA FOR THE UNITED STATES AS AMICUS CURIAE AND "RAILWAY LABOR EXECUTIVES' ASSOCIATION" AS AMICI CURIAE.

Both the Solicitor General of the United States and counsel representing the Railway Labor Executives' Association, which association does not name the organizations they purportedly represent, have made definite, positive, unequivocable statements pertaining to the far reaching and alleged disastrous effects of this Court's decision on the functioning of the National Railroad Adjustment Board.

The Solicitor General, on page 2, makes the statement:

> "The immediate effect of the decision was to halt the operations of the major Divisions of the National Railroad Adjustment Board, the body established under the Act to handle grievance cases. * * * That had never been deemed necessary in the past. The unions have since undertaken to secure such authorizations, and *a relatively small number of cases have been handled on that basis.* * * * A subsequent disagreement as to whether an authorization from every employee is necessary in a test case brought by one but affecting all craft members has closed down the First Division of the Board again." (Italics ours.)

The statement made by the Railway Labor Executives' Association at page 3, at the top thereof is as follows:

> "We feel that the court should be advised that since the announcement of its decision the National Railroad Adjustment Board has virtually ceased to function. * * * This brief is filed with the deep conviction that the whole process of the orderly adjustment of controversies, which is the fruit of railroad labor legislation obtained after long effort on the part of all concerned, is now in serious jeopardy."

We respectfully submit that the only facts that are properly cognizable by this Court are those set out in the

record before it. The orderly procedure set up by this Court, and the Courts throughout the land, necessitate such a rule. However, in view of the fact that two briefs have been filed with this Court in an attempt to have it reverse its decision in this case, both of those briefs having violated that rule, we have endeavored to ascertain the facts. Regretably, it is our understanding that this Court, according to the statement made by the Solicitor General, who sets out these purported facts, was materially induced to grant the rehearing because of the false and the fraudulent statements made by these two counsel. We can understand the concern of this Court if the impression gleaned from the misstatements made, quoted above, were true. Upon investigation, however, we have found that they are false. Herewith we present as an Appendix the complete correspondence with Mr. Stern and the National Railroad Adjustment Board Secretary. Had Mr. Stern received only the letter from said Secretary, we could understand his misapprehension as to the facts involved. However, under date of October 26, 1945, several days before the filing of his brief in the instant case, a letter was addressed to Mr. Stern by the Carrier Members of the National Railroad Adjustment Board, appraising him of the true facts. He has not seen fit to convey those facts to this Court. As a member of this bar, I believe that this Court is entitled to, and that it is the duty of its members admitted to practice before it, to appraise the Court of all the facts. It is within this Court's power to deal with those who hide or pervert the facts, as it wishes.

From a careful reading of the correspondence, original copies of which are in respondents' possession ready to be submitted to the Court, it would appear that there is a concerted attempt on the part of so-called representatives of labor, as represented by the Labor Members of the Board and the Secretary of the Board and the Railway

Labor Executives' Association and Mr. Stern of the Solicitor General's Office, to create with this Court the impression that, by reason of its decision, the National Railroad Adjustment Board has ceased to function. Whereas, in truth and in fact, the Labor Members of the Board have *refused* to sit in an endeavor to further this impression.

From the correspondence submitted (letter dated September 27, 1945, Appendix, page 35) it is apparent that the named reason for refusing to dispose of cases is because the submission failed to show who one Mr. Law was—whether he was a conductor, a brakeman, a member of the crew, or any facts relative to Mr. Law or any service he might have performed.

At the bottom of page 2, in the letter of October 26th addressed to Mr. Stern (Appendix, page 44) by the Carrier Members, they make this statement:

> "By September 4th, or slightly more than 30 days after authorizations were first furnished, they were being received in such number that the Division was not only able to function at full capacity, but it could not keep up with the cases in which such authorizations were received."

On page 3 of said letter is the following:

> "Particular attention is called to the fact that the demand made by Labor members on September 18th and 19th was not because of any requirement to meet the decision of the Supreme Court of the United States, but it was simply a demand that the Carrier members agree to make an award sustaining a claim of a man not mentioned in the docket and whose name appeared only on an authorization form, with no showing whatsoever as to the facts concerning such man.
>
> "On September 18th and ever since that time there have been at all times a sufficient number of dockets meeting the requirements of the EJ&E decision to have kept the Division working at full capacity. It is

> our information, obtained from the Secretary, that there are at this time a considerable number of such dockets and unless the labor organizations have ceased securing such authorizations there was no reason why at all times subsequent to September 18th the Division could not have continued to function at full capacity."

This, then, is the Board's inability to function. This, then, is the oft repeated phrase in the brief of *amici curiae* for the Railway Labor Executives' Association and the Solicitor General, that, by reason of this decision, the Adjustment Board will cease to function, and that the difficulties are so great in obtaining authorizations that it will nigh be possible for any disputes to be settled.

The brief of the Railway Labor Executives' Association is a scholarly history of the evolution of the present Railway Labor Act, but, because practically all of it is based upon the false premise that we have heretofore brought out, we are constrained to answer it. On page 27 thereof, however, a statement is made in reference to the lack of the individual's right, that is as follows:

> "A right to confer does not necessarily include a right to adjust in conference. A right to be heard by an adjustment board does not necessarily contemplate a right to initiate cases."

In answer thereto we cite *Hughes Tool Co.* v. *NLRB*, 147 Fed. 2d 69, wherein the Court states:

> "The trial examiner seems to have considered the word 'present' means no more than to call attention to the grievance, and that all prosecution of it must be by the representative. We understand the Board to disagree with this interpretation, and to hold that individuals and groups may, under the statute, fully prosecute their grievances through all stages and appeals. The Board is right. No one would think a case in court was 'presented' by merely filing it. A presentation of it would include the taking of evidence, the making of argument, and all things necessary to its full understanding."

We respectfully suggest that the statement made by the Court in the *Hughes* case is the perfect answer to the above argument.

On page 30 *amici curiae* (Railway Labor Executives' Association argument) would seem to present a serious obstacle to this Court's opinion, were it not for the fact that on the face of it the example given is purely a jurisdictional question and can only be settled by the union representatives of the crafts involved. It shows an overlapping of the interests of two crafts or two unions. It necessitates a determination of the point where one craft ends and the other begins, or of the zones where they have joint authority. Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake to set a guide for the various principles of agency that would govern the solution of disputes arising from an overlapping of interests from two or more crafts or unions. It established collective bargaining and a command or prohibition to only some of its phases that are enforceable by judicial decree. (*General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R.* v. *Missouri-Kansas-Texas C. Co. et al.*, 64 Supreme Court Reporter, 146, 1943.)

Therefore, we respectfully submit the jumbled example of *amici curia* is not applicable to the instant case.

We respectfully submit that any other arguments propounded by *amici curiae* we have heretofore answered in our reply to the briefs of the petitioner and the Congress of Industrial Organizations.

In conclusion we wish to point out the case of the *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pacific Co.* v. *Southern Pacific Co., et al. General Grievance Committee*

of Brotherhood of Locomotive Firemen and Enginemen v. *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pacific Co., et al.*, 320 U. S. 338, wherein the Court quoted a statement of the Emergency Board appointed in 1937 thus:

> " 'This legislation was enacted for the purpose of protecting national transportation against the consequences of labor disputes between carriers and their employees. It was devised by representatives of management, the employees, and the public. It secured the benefits of unhampered collective bargaining to the several crafts or classes engaged in the work of railway transportation. When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier, all members of the craft or class share in the rights secured by the contract, regardless of their affiliations with any organization of employees. It is clearly provided that these rights may be protected by negotiation or by the several methods of adjustment established by the Act. *It is true that the representatives of the majority represent the whole craft or class in the making of an agreement for the benefit of all, but it is equally true that nothing in the Act denies the right to any employee, or group of employees, to enforce through representatives of his or their own choosing, his or their rights under any such agreement. The whole spirit and intention of the Act is contrary to the use of any coercion or influence against the exercise of an individual's liberty in his choice of representatives in protecting his individual rights secured by law or contract.*' "
>
> "The Act provides for proceedings before the Adjustment Board in disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. Section 3, first (i). *In such cases the parties 'may be heard either in person, by counsel, or by other representatives as they may respectively elect.'*" Section 3, first (i). (Italics ours.)

Conclusion.

We, therefore, respectfully submit that the decision of the majority members of this Court is a true and correct analysis of the law and should not be reversed.

We have shown that the erroneous impression the Court had, which materially affected its decision in granting a rehearing, was not based on the facts. By so doing we have also shown that it is possible to obtain legal and sufficient authorizations for the representatives sufficient to enable the Board to function legally. We believe we have shown that the concensus of law demands that union representatives be not permitted in their "bargaining" to give away or waive the individuals' vested rights. We have endeavored to show the distinction between collective bargaining and the assertion of rights ennuring thereunder, and the distinction between the two, as the Court has so ably done in its decision. We have endeavored to cite cases that were in point under the law and facts involved in the instant case. Petitioner and *amici curiae* have failed to cite any case contrary to the opinion rendered in this case or to the cases we have submitted.

We, therefore, respectfully urge that the decision rendered herein be affirmed.

Respectfully submitted,

John H. Gately,
Counsel for Respondents.

APPENDIX.

September 27, 1945

Honorable H. H. Schwartz, Chairman
The National Mediation Board
Federal Works Building—Room 2018
Washington 25, D. C.

DEAR SIR:

The Carrier Members of the First Division, National Railroad Adjustment Board, desire to inform you of the situation which has arisen on the Division, as follows:

On September 18, 1945, the First Division had before it for consideration Docket No. 20955, Brotherhood of Railroad Trainmen vs. Delaware, Lackawanna & Western Railroad. The claimants were "Conductor J. H. Decker and crew" and "all men who performed similar service subsequent to May 1, 1943." The claim was for an additional day's pay for making side trip on branch line by a crew engaged in interdivisional service. The employees contended the crew had no seniority rights on the branch and that the inter-divisional run did not include the branch.

An authorization for representation by the Brotherhood of Railroad Trainmen had been furnished the Division for J. H. Decker. An authorization had also been furnished for one F. T. Law, but the authorization did not show who Law was, whether he was a conductor or brakeman, whether he was a member of Decker's crew, or any facts relative to Mr. Law or what service he might have performed. His name did not appear in the docket at any place except on the authorization form.

After considerable discussion in which all Division members present participated, Mr. Bishop, member of the Division from the Brotherhood of Railroad Trainmen and

chairman of the Division, prepared an award reading a
follows:

"Docket No. 20955.

The territory between Washington and Phillipsb
is not a part of the interdivisional service establish
between Scranton and Port Morris and claimants hol
no seniority rights to service Washington to Phillip
burg, therefore claim is held to be valid for J. H
Decker and F. T. Law whose authorizations have be
received. Claims of others that may be involved ar
not passed on by the Division.

Award

Claim sustained per findings."

The Carrier Members proposed that the language co
tained in Chairman Bishop's proposed award be change
by eliminating the language following the word "there
fore" and, in lieu thereof, substituting the following:

"Claim sustained for J. H. Decker, and if it be show
F. T. Law was a member of crew of Conductor Decke
claim for Law is sustained."

Chairman Bishop stated he would not accept this pr
posal, that it did not make any difference whether Law w
a member of Decker's crew or not, that they had repr
sentation authority from Law and that his claim must b
sustained. The Carrier Members suggested that the ca
be passed temporarily and other dockets on the calendar b
taken up. Chairman Bishop declined to pass this case. H
stated that no further cases would be taken up by th
Division until Carrier Members agreed to Labor's conte
tion not only for application in this case but in all oth
cases where there were claims for future dates such as we
made in Docket 20955. He also would not agree that th
question could be decided by a referee. The Division the
recessed.

On September 19, the Division again convened and th
Carrier Members offered three alternative proposals fo
awards in Docket 20955, stating that they were willing

accept any one of the three. These three proposals were as follows:

Proposal No. 1:

"The territory between Washington and Phillipsburg is not a part of the interdivisional service established between Scranton and Port Morris and claimants hold no seniority rights to service Washington to Phillipsburg; therefore, claim is sustained for J. H. Decker, and if it be shown that F. T. Law, for whom representation authorization has been filed, was a member of crew of Conductor Decker, claim for Law is sustained. If Law was not a member of Decker's crew, then his claim will not be passed on until such time as adequate facts are presented to the Division.

Award

Claim sustained per findings."

Proposal No. 2:

"The territory between Washington and Phillipsburg is not a part of the interdivisional service established between Scranton and Port Morris and claimants hold no seniority rights to service Washington to Phillipsburg; therefore, claim is sustained for J. H. Decker, and if it be shown that F. T. Law, for whom representation authorization has been filed, was a member of crew of Conductor Decker, claim for Law is sustained. If Law was not a member of Decker's crew, then the Division does not pass on his claim.

Award

Claim sustained per findings."

Proposal No. 3:

"The territory between Washington and Phillipsburg is not a part of the interdivisional service established between Scranton and Port Morris and claimants hold no seniority rights to service Washington to Phillipsburg; therefore, claim is sustained for J. H. Decker.

The Division does not pass on claims for unnamed persons.

Award

Claim sustained per findings."

Chairman Bishop said that none of them would be acceptable to Labor, that the labor representatives had gone as far as they would or could go and would go no further, and that no further business would be handled unless the Carrier Members would accept this proposal and dispose of Docket 20955 on that basis.

A motion was made by the Carrier Members to adopt their Proposal No. 1, but Chairman Bishop declined to put the motion to a vote.

The Carrier Members stated they were ready to proceed with any other docket or any other business before the Division and suggested that Docket 20955 be referred to and determined by a referee. The Labor Members declined to act on such suggestions.

Chairman Bishop then stated there was no further business coming before the Division, whereupon the Members understood the Division was recessed until again convened by call of Chairman Bishop.

Carrier Members present notified the Labor Members that they stood ready and willing to proceed with the making of awards on other cases and to handle any other business in the usual manner, but the Labor Members declined to proceed with the handling of further business.

Very truly yours,

/signed/ F. K. Faherty,
/signed/ L. O. Murdock,
/signed/ O. E. Swan,
/signed/ L. L. McDonald,
/signed/ R. A. Knoff,
Carrier Members.

cc: Labor Members—
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

Executive Secretary—
T. S. McFarland

OFFICE OF THE SOLICITOR GENERAL

Washington, D. C.

October 16, 1945

Mr. T. S. McFarland, Executive Secretary
First Division, National Railroad Adjustment Board
39 South La Salle Street
Chicago, Illinois

Re: Elgin, Joliet & Eastern Ry. Co. v. Burley

DEAR MR. MCFARLAND:

On Monday the Supreme Court granted the petition for rehearing in the above case, vacated its former decision, and set the case for reargument on December 3. Would you be good enough to keep me advised and up to date on any effects the decision is still having upon the operations of your Division. In addition, I would appreciate it if you would write me a letter stating approximately what you told me over the telephone last month as to the effect of the decision upon your Division, giving details as to the decline in the number of cases heard or disposed of in relation to prior periods.

The Court has invited the Solicitor General to appear in the case, and it will be desirable to have any statements we may make as to the effect of the decision based on something more tangible than my recollection of a telephone conversation.

I am grateful for the assistance you have accorded me so far, which I think may have been among the factors which induced the Court to reopen the case. I trust that these requests will not impose an undue burden upon you.

Yours sincerely,

ROBERT L. STERN,
Special Assistant to the
Attorney General.

October 19, 1945

Mr. Robert L. Stern
Special Ass't to the Attorney General
Washington, D. C.

DEAR MR. STERN:

Receipt is respectfully acknowledged of your letter of 16th instant requesting additional information as to the effect on the First Division of the United States Supreme Court Decision No. 160, Elgin, Joliet and Eastern Railway versus Burley.

The First Division is not holding executive Sessions for the purpose of considering and rendering awards in any of the 3,778 cases awaiting such action.

The Division first discontinued such meetings because of that decision on June 29. Operations were begun again on a small scale on July 31 as a result of Representation Authorizations having been obtained and filed by the Organizations representing the claimants.

Handicapped, and their efforts reduced to a low-minimum by the lack of a sufficient number of such authorizations, the Division continued to function a short time each day until September 19, when such meetings were discontinued because of a situation which grew out of Decision No. 160.

During the four months, July, August, September and October to date, only 141 awards have been rendered by the First Division whereas during the four months immediately preceding that period, namely, March, April, May and June, 483 awards were rendered.

As the situation now stands, the Division is not functioning to the extent of holding meetings for the purpose of rendering awards, and as very few cases are being filed it can be correctly assumed that a new backlog of cases is being accumulated on the Carriers for final submission to the Division if, as, and when the obstacles are removed.

In the foregoing, it has been stated that the Division functioned moderately in giving consideration to dockets

where Representation Authorizations had been received, and it is only fair to say that in connection with a number of dockets, to be exact—24, it was necessary for the Organizations submitting the claims to ask the withdrawal of the names of 27 claimants because they were not available to sign the authorizations, and when it is considered that a substantial number of these claimants were not available because they were in the Army or Navy, the seriousness of the situation can be better understood.

We were asked to withdraw these names from the claims because otherwise the decisions in the cases would be further delayed as the Division would not consider the interest of a claimant as being properly before the Division if he had not signed an authorization.

In stopping the activities of the Division, the services of two Referees were discontinued in the midst of their assignments and they cannot return to complete their assignments because of Decision No. 160, and in addition thereto, a Referee has been appointed in 48 other deadlocked cases, and we cannot avail ourselves of his services.

As I told you over the telephone, the chaotic condition created by Decision No. 160 can hardly be exaggerated, and the seriousness of it is not the inconvenience to which the Division has been placed in its efforts to meet this situation but the harrassing of the claimants, the men on the property who are expected to do the work, has resulted in extreme dissatisfaction on their part.

Furthermore, they could not understand why some case recently docketed (in connection with which an authorization was filed) should be run around other cases which have been on the docket four or five years.

All of this has created a feeling of dissatisfaction on the part of employees of the carriers and creates a fertile field for subversive work on the part of certain factions that we have been trying to keep out of the railroad situation where employees are now being represented by the more conservative organizations. There is evidence that these "certain factions" are not overlooking their opportunity to sew seeds of discontent with a view to establishing them-

selves as the accredited representatives of the more conservative railroad employees.

The question is just how long this condition can safely continue. Congress set up the First Division of the National Railroad Adjustment Board to help keep the peace on the railroads and to prevent interruptions of interstate traffic by rail carriers. The machinery is not functioning and the organizations are no longer bound by their promises not to use their economic strength.

To add to the danger "certain factions" are trying to take over. The situation could get out of control as in 1920 or otherwise.

If there is anything further that I might do to be helpful in clearing up the situation, please command me.

Yours very truly,

T. S. McFARLAND,
Secretary.

TSM:dls

October 26, 1945.

Mr. Robert L. Stern
Special Assistant to the Attorney General
Office of the Solicitor General
Washington, D. C.

DEAR SIR:

Our attention has been directed to a copy of your communication of October 16, 1945, addressed to Mr. T. S. McFarland, Secretary of the First Division of the National Railroad Adjustment Board, and to what Mr. McFarland has furnished us as a copy of his reply under date of October 19, 1945.

Mr. McFarland did not advise Carrier members of any telephone conversation he had with you as referred to in your communication until October 19th, and we have no information as to what he might have said in such telephone conversation.

Because of inaccuracies in Mr. McFarland's letter to you of October 19th, we cannot permit it to go to you as the basis of any action on your part without calling your attention to the facts.

We first respectfully invite your attention to the facts.

On June 11, 1945, the Supreme Court of the United States handed down an opinion in the case of *Elgin, Joliet & Eastern Railway Company* v. *Burley, et al.* Some days later, the attention of the various members of the First Division of the National Railroad Adjustment Board was called to this decision. The Carrier members of the First Division thereafter gave the decision considerable study and consideration, and as a result thereof felt that the situation presented was such as to make legal advice desirable. Accordingly, such legal advice was sought, and as a result thereof the Carrier members on June 29, 1945, served oral notice on the Labor members of the First Division in accordance with Exhibit A attached hereto. As there were no dockets on file with the Division in which the individual claimants had authorized the organization presenting the claim to do so, there were no dockets on which the Di-

vision could act until such authorizations were supplied. All that was required in these dockets under the EJ&E decision was proof of authority, if any.

We are not advised, except through hearsay, as to the action of the various labor organizations appearing in cases pending before the First Division, but immediately prior to July 31, 1945, the Chairman of the First Division, who is a Labor member, called attention to the fact that there were some documents received, signed by individuals, authorizing the labor organizations to handle their claims. Carrier members advised the Labor members that they were ready, and had been at all times, to proceed to handle all claims which met the requirements as laid down by the Supreme Court in the Elgin Joliet & Eastern case, and on July 31st two awards were made by the Division. Thereafter, other authorization forms reached the Division, and as quickly as such forms were received the Division took up and acted on the dockets in which there were authorizations.

During the month of August authorization forms continued to reach the Division and as each docket was completed by proof of authority the Division promptly proceeded to act on such docket. By September 4th, or slightly more than 30 days after authorizations were first furnished, they were being received in such number that the Division was not only able to function at full capacity, but it could not keep up with the cases in which such authorizations were received.

During the two weeks period from September 4th to 18th the Division rendered 73 awards and was prepared to render awards in some additional dockets on that date. There is attached hereto copy of a communication dated September 27, 1945, to the Chairman of the National Mediation Board reciting the facts as they occurred on September 18th and 19th.

Since September 19th the Labor members of the First Division have refused to sit or to consider on the Division any dockets whatsoever, in accordance with their statements made on September 19th, notwithstanding the fact that the dispute covered by Docket 20955 has since been disposed of on the property and withdrawn from the Division.

Particular attention is called to the fact that the demand made by Labor members on September 18th and 19th was not because of any requirement to meet the decision of the Supreme Court of the United States, but it was simply a demand that the Carrier members agree to make an award sustaining a claim of a man not mentioned in the docket and whose name appeared only on an authorization form, with no showing whatsoever as to the facts concerning such man.

On September 18th and ever since that time there have been at all times a sufficient number of dockets meeting the requirements of the EJ&E decision to have kept the Division working at full capacity. It is our information, obtained from the Secretary, that there are at this time a considerable number of such dockets and unless the labor organizations have ceased securing such authorizations there was no reason why at all times subsequent to September 18th the Division could not have continued to function at full capacity.

Referring to Mr. McFarland's reply to you of October 19th, we make the following comment:

The second paragraph of the communication is correct, the reason therefor being set out in the communication to the Chairman of the Mediation Board as hereinabove referred to.

The third paragraph is not correct. The Division discontinued holding executive sessions for the reasons set out in the letter of September 27, 1945, hereinbefore referred to.

The fourth paragraph is not accurate. Beginning with July 31st the Division handled promptly dockets in which authorizations had been supplied, and by September 4th the Division was able to devote its full time each day to a consideration of pending cases.

The fifth paragraph of Mr. McFarland's letter is entirely misleading. He undertakes to compare the number of awards made during the months of July, August, September and October (3½ months) with the four months of March, April, May and June. No awards were rendered during the month of July until July 31st, there being no proof of

authority furnished until that date. During most of August authorizations received were not such as to keep the board functioning at the normal rate, but by September 4th they were coming in at such rate that the Division was devoting its full time to the consideration of dockets before it. If there is to be a comparison of operations under the requirements laid down in the EJ&E case, it should be during such period of time as normal operations were possible. An accurate comparison would be to take the period September 4th to 18th during which 73 awards were rendered. Mr. McFarland, however, points out, without explanation, that 483 awards were rendered during the four full months of March, April, May and June, and only 141 during July, August, September and October. He failed, however, to call your attention to the fact that of the 483 awards 135 were made by five different referees. This leaves 348 made by the Division, without a referee, during the four months, or an average of 87 per month. Compare this 87 per month with the 73 made during the two weeks in September by the Division without a referee. The real fact is that beginning September 4th functioning of the Division was more satisfactory and we were disposing of more cases than had ever been true before.

Referring to the sixth paragraph of Mr. McFarland's letter, the Division is not functioning for the reasons heretofore stated. If cases are not being filed before the Division as the Secretary states, it can only be assumed it is due to the action of the Labor organizations, or to more sincere efforts to settle claims on the individual properties.

As to the seventh paragraph of Mr. McFarland's communication, we have no knowledge of the number of claimants whose authorizations could not be secured because they were in the Army or Navy, or the number of individuals who have declined to sign forms authorizing Labor Organizations to present claims for them.

As to the ninth paragraph of Mr. McFarland's communication, there is no reason why the two referees in question might not have completed their assignments long before this if the organizations in question had secured proof of authority and filed them with the Division. As to the

referee appointed in the 48 other deadlocked cases, there is no reason why this referee should not report and proceed to handle these cases as authorizations have been received on all of these dockets.

As to the tenth paragraph of Mr. McFarland's letter, it must be borne in mind that Mr. McFarland has no knowledge of anything which took place in the Board Room except possibly hearsay statements. The decision of the Supreme Court did not create any chaotic condition whatsoever. It merely required that before a claim could be handled there must be evidence of authority of the person presenting it to do so. This did not place any inconvenience whatsoever upon the Division, nor could it result in harassing of any claimant.

The eleventh paragraph is so worded as to create an entirely false impression. Mr. McFarland, as well as all labor representatives, knows that for years it has been the practice on the First Division to handle so-called "hearing-waived" cases ahead of "hearing" cases which might have been on the docket four or five years. No change whatsoever in this practice has been brought about.

As to the twelfth paragraph of Mr. McFarland's letter, this would seem to constitute merely conclusions on the part of Mr. McFarland. What he refers to as subversive factions, we do not know, nor do we know to whom he refers when he says "we have been trying to keep out of the railroad situation" these subversive factions.

Very truly yours,

/signed/ R. A. KNOFF,
Vice Chairman, for Carrier Members.

CC: *Labor Members:*
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter
Secretary T. S. McFarland

October 26, 1945.

Honorable H. H. Schwartz, Chairman
The National Mediation Board
Federal Works Building, Room 2018
Washington 25, D. C.

DEAR SIR:

Referring to the communication of Carrier members of the First Division of the National Railroad Adjustment Board, addressed to you under date of September 27, 1945, concerning the situation on the First Division growing out of the consideration of Docket 20955, *Brotherhood of Railroad Trainmen* v. *Delaware, Lackawanna & Western Railroad*, we attach hereto for your information a copy of our letter of this date to the Labor members of the First Division.

Very truly yours,

/signed/ R. A. KNOFF,
Vice Chairman, for Carrier Members.

cc: Labor Members—
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

Executive Secretary—
T. S. McFarland

October 26, 1945.

Memorandum to: Labor Members—
Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

Referring to communication addressed by the Carrier members of the First Division of the National Railroad Adjustment Board to the Chairman of the National Media-

tion Board under date of September 27, 1945, a copy of which was sent to you, this is to respectfully call your attention to the communication of October 15, 1945, from the Secretary of the First Division to the Vice President of the Delaware, Lackawanna & Western Railroad and to the President of the Brotherhood of Railroad Trainmen, advising that Docket 20955, *Brotherhood of Railroad Trainmen* v. *Delaware, Lackawanna & Western Railroad* "having been withdrawn is removed from our calendar of cases."

The case having been withdrawn from the Division, are you not therefore in position to resume consideration of other dockets pending before the Division? Your prompt advice will be appreciated.

/signed/ R. A. KNOFF,
Vice chairman, for Carrier Members.

cc: Mr. T. S. McFarland, Secretary.

October 29, 1945.

Memorandum for Members:

Herewith copy of letter of 26th instant from Robert L. Stern, Assistant to the Attorney General.

T. S. MCFARLAND,
Secretary.

TSM:dls

—Attachment—

OFFICE OF THE SOLICITOR GENERAL

Washington, D. C.

October 26, 1945.

Mr. T. S. McFarland
National Railroad Adjustment Board
First Division
39 South LaSalle Street
Chicago 3, Illinois

DEAR MR. MCFARLAND:

Re: Elgin, Joliet & Eastern Ry. Co.
v. Burley

Thank you very much for your letter of October 19. It will be very helpful. If you or any of the members of your Division have any additional information or wish to present their views or make any suggestions, I will of course be very glad to receive them. I am engaged in preparing the brief to be submitted by the Government on the re-argument, and will appreciate all the expert assistance I can obtain.

Sincerely yours,

ROBERT L. STERN.

October 30, 1945.

Memorandum to: Carrier Members—
Messrs. R. A. Knoff
T. K. Faherty
L. L. McDonald
L. O. Murdock
O. E. Swan

Replying to your memorandum of October 26th concerning the situation existing on the First Division making it impossible to function and your reference to withdrawal of Docket No. 20955.

We are aware that you Carrier Members were able to prevail on the Delaware, Lackawanna and Western and secure the withdrawal of Docket No. 20955, but in view of the fact that such cases had always been previously handled by the Division and your commitment as to the kind of cases you were willing to pass on and the further fact that the Division has for years and immediately preceding the discussion on Docket No. 20955 handled cases coming to the Division in the form that were handled by the committees on the railroads, the withdrawal of Docket No. 20955 doesn't settle anything. In fact, there are so many of these claims that it would only be a few hours or a day or two until we met with the same controversy so from our viewpoint it is useless to waste the time of the members of the Board in handling only such dockets as the Carrier Members may feel disposed to consider.

We are prepared to take up the dockets and handle same on the basis that the dispute has been progressed with the Carrier up to the Board as we have been doing since the Board started to function until you Carrier Members conceived the idea of limiting the functioning of the Board to such cases that pleased your convenience to handle.

If and when you are prepared to resume handling on the basis of considering and deciding cases as submitted to the Board; in other words, recede from the position you took when Docket No. 20955 was under consideration and get down to earth following the former procedure, we believe the Board can again function—otherwise, it seems we would only be wasting our time.

S/ Wm. Bishop,

Chairman—For Labor Members.

cc: Mr. T. S. McFarland, Secretary

October

Memorandum to: Labor Members—

Wm. Bishop
M. G. Leach
J. L. Witherspoon
F. J. Williams
Paul M. Carter

We are in receipt of communication dated
dressed to Carrier Members signed by Mr. I
Labor Members in which reply is made to ou
October 26th concerning the situation existing o
Division, reference being made to a withdrawal
20955.

You, of course, are in error in your assum
Carrier Members prevailed on the D. L. & W. f
pose of securing the withdrawal of Docket 2095

With respect to your position as to further h
the Division of cases now on its docket, you, of c
definitely the position of Carrier Members.

/signed/ R. A. Kn

Vice Chairman, for Carrier

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